90-707

No.

Supreme Court, U.S.
FILED
OCT 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DEAN WITTER REYNOLDS INC. AND DON L. HARRIS,
Petitioners,

v.

JOAN CHASON ALFORD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), required that respondent's employment discrimination claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, be submitted to arbitration pursuant to an individual agreement by respondent to arbitrate any dispute, claim or controversy arising out of her employment or the termination of her employment?

PARTIES BELOW AND PARENT COMPANIES

The names of the parties below are identified in the Petition. The parent companies of petitioner Dean Witter Reynolds Inc. are Dean Witter Financial Services Inc. and Sears, Roebuck & Co.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Dean Witter Reynolds Inc. ("Dean Witter") and Don L. Harris ("Harris") respectfully request that this Court grant the Petition for a Writ of Certiorari seeking review of the decision and judgment of the United States Court of Appeals for the Fifth Circuit. As discussed below, a review of the issues presented in this case is necessary to resolve a conflict among the circuits and to enable the Court to determine whether the FAA requires arbitration of employment discrimination claims pursuant to an individual arbitration agreement.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is published at 905 F.2d 104 and is set forth in the Appendix to the Petition ("Pet. App.") at 1a. The opinion of the United States District Court for

the Southern District of Texas is reported at 712 F. Supp. 547 and is set forth in Pet. App. at 8a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 11, 1990. Pet. App. at 1a. A petition for rehearing was denied by order of that court dated August 3, 1990. Pet. App. at 12a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved in this case are: [1]

Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*

Section 2, 9 U.S.C. § 2
Section 3, 9 U.S.C. § 3
Section 4, 9 U.S.C. § 4

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*

Section 706, 42 U.S.C. § 2000e-5

STATEMENT OF THE CASE

Petitioners seek review of a decision and judgment of the United States Court of Appeals for the Fifth Circuit that affirmed a district court order denying petitioners' motion to dismiss and to compel arbitration under the FAA of respondent's claims brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ("Title VII").

A. Factual Background

Joan Chason Alford ("Alford) was employed by Dean Witter on or about August 7, 1984 as a registered representative of Dean Witter in the purchase and sale of

[1] The text of these provisions is set forth in Pet. App. at 14a-25a.

securities for customers of the company. Harris was the manager of the Dean Witter office where Alford was employed.

At or around the time of her employment with Dean Witter and as a condition of her employment, Alford executed a Uniform Application For Securities Industry Registration ("Form U-4") that contained the following agreement:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register as indicated in Question 8.

Two of the organizations with which Alford registered, as indicated in Question 8 on her application, were the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"). NYSE Rule 347 provides that:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

In addition, NASD's Code of Arbitration Procedure provides in relevant part as follows:

> Sec. 1. This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII, Section 1(a)(3) of the By-Laws of the National Association of Securities Dealers, Inc. (the "Association") for the arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of the Association, with the exception of disputes involving the insurance business of any member which is also an insurance company:

(1) between or among members;

(2) between or among members and public customers, or others; and

(3) between or among members, registered clearing agencies with which the Association has entered into an agreement to utilize the Association's arbitration facilities and procedures, and participants, pledgees or other persons using the facilities of a registered clearing agency, as these terms are defined under the rules of such registered clearing agency.

* * *

Sec. 8 (a) Any dispute, claim or controversy eligible for submission under part I of this Code between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), shall be arbitrated under this Code, at the instance of:

(1) a member against another member;

(2) a member against a person associated with a member against a member; and

(3) a person associated with a member against a person associated with a member.[2]

Alford's employment with Dean Witter was terminated on July 31, 1987 by Harris after she proved to be an unsatisfactory employee. Prior to and after her termination from Dean Witter, Alford filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that she had been discriminated against because of her sex and retaliated against in violation of Title VII.

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[2] Harris also similarly was bound to submit to arbitration any disputes either with Dean Witter or with other registered representatives of the NYSE or persons associated with the NASD. Thus, it is clear that the agreements contemplated that any disputes of Alford with Dean Witter and/or Harris would be resolved by arbitration.

B. Procedural Background

On July 5, 1988, Alford filed suit in the United States District Court for the Southern District of Texas, Houston Division. Her complaint alleged that she was discriminated against in violation of Title VII by Dean Witter and Harris on the basis of her sex, in her terms and conditions of employment and by her termination. Her complaint also alleged that her termination was in retaliation for her having filed a charge of discrimination with the EEOC and for her having opposed alleged practices which she claimed constituted unlawful sex discrimination.

By letter to Alford's counsel dated July 28, 1988, Dean Witter and Harris demanded that Alford submit any claims and controversies arising out of her employment with Dean Witter or the termination thereof to arbitration under the auspices of either the NYSE or NASD. By letter dated August 19, 1988, Alford responded that Title VII did not require exhaustion of remedies, such as arbitration, before commencing a private action and that she would not submit or agree to submit her claims to arbitration as requested.

On September 19, 1988, Dean Witter and Harris moved to dismiss Alford's claims and to compel arbitration pursuant to the FAA.[3] By order entered on May 31, 1989, the district court concluded that the issues raised in the motion were controlled by this Court's decision in *Alex-*

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[3] In their motion, Dean Witter and Harris requested that the court find that the parties had entered into an agreement by which Alford agreed to arbitrate her employment-related disputes with Dean Witter and Harris; that Alford be required to submit her employment-related disputes to arbitration and that her complaint be dismissed with prejudice; and, alternatively, that Alford's Title VII suit be stayed and that she be ordered to submit her employment-related claims to arbitration.

ander v. Gardner-Denver Co., 415 U.S. 36 (1974).[4] Pet. App. at 9a. The court determined that Alford's Title VII claims were not subject to arbitration, notwithstanding the fact that *Alexander* involved arbitration pursuant to a collective bargaining agreement and *not* pursuant to an individual arbitration agreement. The court denied the motion to dismiss and to compel arbitration. *Id.* at 11a.

Dean Witter and Harris took timely appeals to the Fifth Circuit pursuant to 9 U.S.C. § 15. By an opinion dated July 11, 1990, the Fifth Circuit affirmed the district court's denial of the dismissal of Alford's claims and the request of Dean Witter and Harris for an order compelling arbitration. Pet. App. at 1a. In doing so, the Fifth Circuit also ultimately concluded that the issue was controlled by *Alexander*, although apparently not without reservations.

Before so deciding, however, the Fifth Circuit acknowledged the more recent decisions of this Court, where parties subject to individual arbitration agreements have been required to arbitrate various statutorily-based claims, including claims under the securities and antitrust laws and under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"). Pet. App. at 1a-2a.[5] In light of these more

[4] The district court apparently recognized that Alford had an arbitration agreement within the meaning of 9 U.S.C. § 2. The district court stated that "Alford executed . . . an agreement . . . which contained a clause stating she agreed to resolve by arbitration any controversy arising out of her employment including her termination." Pet. App. 8a-9a. Despite the arbitration agreement, the district court nevertheless concluded that *Alexander* controlled and precluded arbitration of Alford's Title VII claims.

[5] *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 109 S. Ct. 1917 (1989) (securities claims); *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220 (1987) (securities and RICO claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (antitrust claims).

recent decisions of this Court involving individual arbitration agreements,[6] the Fifth Circuit panel observed that:

> If the issue were open to us to evaluate afresh, we might well interpret Title VII consistent with these recent decisions. But, because of the *Alexander* decision, the issue is not an open one.

Pet. App. at 3a.

The Fifth Circuit regarded the rationale in *Alexander* to be broad enough to cover the arbitration of any Title VII claims, whether those claims arose in the context of a collective bargaining agreement or under an individual agreement, such as here, to arbitrate all employment-related disputes. *Id.* at 4a. In doing so, the panel determined that it was bound by *Alexander* "until the Court holds otherwise." *Id.* at 6a.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioners Dean Witter and Harris respectfully request that the Court grant their petition for a writ of certiorari to resolve a conflict among the circuits regarding the arbitrability, pursuant to an individual arbitration agreement, of claims brought under federal equal employment opportunity statutes. The Court has agreed to decide whether claims brought under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), are subject to arbitration pursuant to an individual arbitration agreement. *See Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir.), *cert. granted*, 111 S. Ct. 41 (1990). The Court should grant the petition herein to ensure consistency in the application of federal equal employment opportunity or other employment-related statutes by determining whether

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[6] The Fifth Circuit panel recognized that "[p]ermitting enforcement of statutory remedies by means of contractual arbitration has thus become the norm rather than the exception for contracts governed by the Federal Arbitration Act ("FAA"). Pet. App. at 3a.

claims brought under Title VII also are subject to arbitration pursuant to an individual arbitration agreement.

In addition, review of this case will allow the Court to reconcile the important policies favoring arbitration underlying the FAA and those underlying Title VII. Moreover, such a review also will provide an opportunity for the Court to address the applicability to Title VII claims of its recent series of decisions requiring arbitration, pursuant to an individual arbitration agreement, of disputes involving other important statutorily-based claims.

I. THE COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS REGARDING THE ARBITRABILITY OF FEDERAL EQUAL EMPLOYMENT OPPORTUNITY CLAIMS

Petitioner's writ of certiorari should be granted to enable the Court to resolve a conflict among the circuits on the issue of whether claims brought pursuant to federal equal employment opportunity statutes are subject to arbitration under the FAA where the parties have agreed, through an individual arbitration agreement, to arbitrate all employment-related claims. Because the Court has agreed to review this issue as it relates to claims brought under the ADEA, it should resolve the nearly identical issue presented herein—that is, whether Title VII claims also are subject to arbitration under the FAA where the parties have agreed to arbitrate all claims or disputes. *See* Sup. Ct. R. 10.1(a).

On October 1, 1990, this Court granted certiorari in *Gilmer* to decide the issue of whether claims brought under the ADEA are subject to arbitration pursuant to an individual agreement to arbitrate any dispute, claim or controversy arising between the parties.[7] The Fourth Cir-

[7] Gilmer, like Alford, was required at the time of his employment to register as a securities representative with the NYSE. *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d at 196 n.1. Gilmer's arbitration agreement was essentially the same as that

cuit in *Gilmer* held that Gilmer's ADEA claims were subject to arbitration pursuant to the FAA after it determined that there was nothing in the text, legislative history or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements. 895 F.2d at 197. In this regard, the Fourth Circuit in *Gilmer* noted that "Courts should be reluctant . . . to imply in a statute an intention to preclude enforcement of arbitration agreements where Congress has not expressed one, particularly in light of the countervailing intention expressed by Congress in the FAA." *Id.*

Moreover, the Fourth Circuit in *Gilmer*, unlike the Fifth Circuit herein, expressly rejected Gilmer's contention that this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and its progeny,[8] were controlling where the arbitration agreement was not pursuant to a collective bargaining agreement, but rather was pursuant to an individual agreement to arbitrate all claims or disputes. *Gilmer*, 895 F.2d at 201-02.

Thus, notwithstanding the fact that the "prohibitions of the ADEA were derived in haec verba from Title VII," *Lorillard v. Pons*, 434 U.S. 575, 584 (1978), the Fourth and Fifth Circuits have reached diametrically inconsistent results regarding the arbitrability, pursuant to an individual arbitration agreement, of claims under Title VII and the ADEA. In addition, numerous other decisions have reached conflicting results on whether or not similar

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executed by Alford herein and brought Gilmer under Rule 347 of the NYSE, *id.*, one of the Rules applicable to Alford as a result of her agreement.

[8] *See Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557 (1987); *McDonald v. City of West Branch*, 466 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981).

claims are subject to arbitration pursuant to an individual arbitration agreement.[9]

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[9] In addition to the Fourth Circuit in *Gilmer*, numerous other courts have found employment-related statutory claims to be subject to arbitration pursuant to an individual arbitration agreement. *See, e.g., Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988) (claim under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA")); *Pierce v. Shearson Lehman Hutton, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1882 (N.D. Ill. 1990) (ADEA claim); *Roe v. Kidder, Peabody & Co.*, 52 Fair Empl. Prac. Cas. (BNA) 1865 (S.D.N.Y. 1990) (Title VII claim); *Steele v. L.F. Rothschild & Co.*, 701 F. Supp. 407 (S.D.N.Y.), *appeal dismissed*, 864 F.2d 1 (2d Cir. 1988) (claim under Equal Pay Act of 1963, 29 U.S.C. § 206(d)); *Garfield v. Thomson McKinnon Securities, Inc.*, 731 F. Supp. 841 (N.D. Ill. 1988) (ADEA claim); *Pihl v. Thomson McKinnon Securities, Inc.*, 48 Fair Empl. Prac. Cas. (BNA) 922 (E.D. Pa. 1988) (ADEA claim); *Hall v. Nomura Securities Int'l*, 268 Cal. Rptr. 45 (Ct. App. 1990) (claims under California antidiscrimination statutes); *see also Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 231 (3d Cir. 1989) (Becker, J., dissenting); *Bird v. Shearson Lehman/American Exp., Inc.*, 871 F.2d 292, 298 (2d Cir.), *vacated and remanded in light of Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 109 S. Ct. 1917 (1989), 110 S. Ct. 225 (1989) (Cardamone, J., dissenting); *Anderson v. Dean Witter Reynolds, Inc.*, 449 N.W.2d 468, 470 (Minn. Ct. App. 1989) (Randall, J., dissenting) ("The compulsory arbitration process can provide a speedy and fair hearing on the merits of the [Minnesota Human Rights Act] claim.").

A number of other courts have held that parties may not be compelled to arbitrate certain employment-related statutory claims pursuant to an individual arbitration agreement. *See, e.g., Nicholson v. CPC Int'l Inc.*, 877 F.2d 221 (3d Cir. 1989) (ADEA claim); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 842 (1990) (Title VII claim); *Bird v. Shearson Lehman/American Exp., Inc.*, 871 F.2d 292 (2d Cir.), *vacated and remanded in light of Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 109 S. Ct. 1917 (1989), 110 S. Ct. 225 (1989) (ERISA claim); *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 110 S. Ct. 143 (1989) (Minnesota Human Rights Act claim, Minn Stat. § 363.03 (1988)); *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985) (ERISA claim); *Jones v. Baskin, Flaherty, Elliot & Mannino,*

Accordingly, because the Court has agreed in *Gilmer* to decide whether ADEA claims are subject to arbitration pursuant to an individual arbitration agreement, it also should decide in this case whether Title VII claims similarly are subject to arbitration pursuant to such an individual agreement.

II. REVIEW IN THIS CASE WILL ALLOW THE COURT TO ADDRESS THE APPLICABILITY TO TITLE VII OF ITS RECENT SERIES OF DECISIONS REQUIRING ARBITRATION OF STATUTORILY-BASED CLAIMS UNDER THE FAA

Even apart from the need to resolve the conflict in circuits as discussed above, the Court should grant the petition to address the applicability of its recent series of decisions requiring the arbitration of statutorily-based claims where the parties have entered into individual agreements to arbitrate all claims or disputes. Moreover, such a review will enable the Court to reconcile the strong policies favoring arbitration, as evidenced by these decisions and by the FAA, with the policies underlying Title VII and other federal equal employment opportunity statutes.

Congress enacted the FAA to "revers[e] centuries of judicial hostility to arbitration agreements." *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 225 (1987) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974)). This was to be accomplished by "plac[ing] arbitration agreements 'upon the same footing

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P.C., 670 F. Supp. 597 (W.D. Pa. 1987), *aff'd*, 897 F.2d 522 (3d Cir.), *cert. denied*, 111 S. Ct. 47 (1990) (ERISA claim); *Steck v. Smith Barney, Harris Upham & Co.*, 661 F. Supp. 543 (D.N.J. 1987) (ADEA claim); *Anderson v. Dean Witter Reynolds, Inc.*, 449 N.W.2d 468 (Minn. Ct. App. 1989) (Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 1(2)(b) & (c) (1988)).

as other contracts'." *Scherk*, 417 U.S. at 511 (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924)).[10]

Section 2 of the FAA makes covered written agreements to arbitrate existing or future disputes enforceable. 9 U.S.C. § 2; *McMahon*, 482 U.S. at 226. Section 2 of the FAA also provides that an arbitration agreement may be invalidated *only* on "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 3 of the FAA provides that a federal district court *shall* stay its proceedings if it is satisfied that an issue is within the scope of an agreement to arbitrate. 9 U.S.C. § 3. Finally, Section 4 of the FAA gives a court the authority to issue an order compelling arbitration where there has been a "failure, neglect, or refusal" to comply with an arbitration agreement. 9 U.S.C. § 4.[11]

This Court has observed that the first task of a court asked to compel arbitration is to determine whether the parties agreed to arbitrate the dispute. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985). That determination is to be made by applying the " 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.' " *Id.* (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *see also Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). Thus, this Court has noted that the FAA establishes a "federal policy favoring arbitration," *McMahon*, 482 U.S.

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[10] This Court has noted that the "preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

[11] This Court has stated that "[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. at 218 (emphasis in original).

at 226 (quoting *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24),[12] and that this federal policy requires that "we rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *see also Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 109 S. Ct. 1917, 1920 (1989); *McMahon*, 482 U.S. at 226.[13]

The Court has held that "[t]his duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *McMahon*, 482 U.S. at 226. As the Court noted in *McMahon*, *id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 627), where a dispute is based on a statute, " 'we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals' should inhibit enforcement of the Act." Moreover, this Court has made clear that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum." *Mitsubishi Motors Corp.*, 473 U.S. at 628; *see also Rodriguez de Quijas*, 109 S. Ct. at 1920; *McMahon*, 482 U.S. at 229; *Scherk v. Alberto-Culver Co.*, 417 U.S. at 519 (characterizing arbi-

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[12] This Court stated in *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25, that the FAA is a:

> [C]ongressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of [the FAA] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act. . . . [The FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.

See also Mitsubishi Motors, 473 U.S. at 626.

[13] Thus, in the absence of any explicit congressional intention to the contrary, *see* discussion below, there would appear to be no reason why Alford's claims would not be arbitrable under the FAA.

tration agreements as "in effect, a specialized kind of forum-selection clause").

With these principles in mind, it is not surprising that in recent years this Court has upheld numerous agreements to arbitrate claims arising under various federal statutes. *See Rodriguez de Quijas*, 109 S. Ct. at 1920-21 (claims under Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 771*l*(2)); *McMahon*, 482 U.S. at 237, 241-42 (claims under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and under RICO); *Mitsubishi Motors*, 473 U.S. at 640 (antitrust claims under the Sherman Act, 15 U.S.C. §§ 1 *et seq.*). Thus, the Court has observed that "[t]he Arbitration Act, standing alone . . . mandates enforcement of agreements to arbitrate statutory claims." *McMahon*, 482 U.S. at 226.[14]

While it has enforced numerous arbitration agreements where statutory claims are involved, the Court has determined that "the Arbitration Act's mandate may be overridden by a contrary congressional command." *Id.* Where a party asserts that a "contrary congressional command" precludes the enforcement of an arbitration agreement, the party must establish the basis for the preclusion:

> The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit

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[14] The efficacy of arbitration of various types of disputes has been widely recognized. *See, e.g.*, Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J. 78, 79 (1985). Moreover, arbitration has been suggested by many as a speedy and relatively inexpensive means of coping with the ever-increasing caseload in our judicial system. *See, e.g.*, Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274, 277 (1982). Like many other types of claims, the number of employment discrimination cases filed in the federal courts has increased dramatically in recent years. *See Report of the Federal Courts Study Committee* 60-61 (Apr. 2, 1990) ("Since 1969, the number of private employment discrimination cases filed in the federal courts has increased more than 2,000 percent.").

> waiver of a judicial forum for a particular claim, such an intent, "will be deducible from [the statute's] text or legislative history," or from an inherent conflict between arbitration and the statute's underlying purposes.

Id. at 227 (quoting *Mitsubishi Motors*, 473 U.S. at 628) (citations omitted); *see also Rodriguez de Quijas*, 109 S. Ct. at 1921.

Notwithstanding the clear federal policy favoring arbitration, as evidenced in the FAA and in the recent decisions of this Court enforcing agreements to arbitrate statutory claims, the Fifth Circuit in the instant case determined that it was not appropriate to compel the arbitration of Alford's Title VII claims. Pet. App. at 6a-7a.[15] In doing so, the Fifth Circuit concluded that this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), a case involving a collective bargaining agreement and *not* an individual arbitration agreement, was controlling and dictated that Alford's Title VII claims were not subject to arbitration. Pet. App. at 3a. In so doing, the Fifth Circuit created a direct conflict between the arbitrability of claims brought under Title VII and those brought pursuant to other important federal statutes—a conflict which, it is respectfully submitted, this Court should resolve.

In *Alexander*, 415 U.S. at 60, the Court determined that an employee's right to a trial de novo under Title VII was not foreclosed by an adverse arbitral decision pursuant to the non-discrimination clause of the applicable collective bargaining agreement. As discussed below, however, the various rationales underlying *Alexander*, and relied upon by the Fifth Circuit herein, either have no

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[15] Neither the Fifth Circuit herein, nor other courts that have addressed the issue, cited anything in the text or legislative history of Title VII that addresses directly the issue of whether the FAA mandates that Title VII claims are subject to arbitration pursuant to an individual arbitration agreement.

applicability to Alford's individual arbitration agreement or have been sufficiently eroded by later decisions of this Court so as to provide no support for the Fifth Circuit decision.

Because *Alexander* involved a collective bargaining agreement and *not* an individual arbitration agreement such as that executed by Alford herein, the Court in *Alexander* did not address the important policies reflected in the FAA, including the " 'federal policy favoring arbitration' requiring that '[courts] rigorously enforce agreements to arbitrate'." *McMahon*, 482 U.S. at 226 (quoting *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24, and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. at 221); *see also Gilmer*, 895 F.2d at 201. If the petition is granted herein, the Court will have an opportunity to address fully the application of these policies underlying the FAA to claims brought under Title VII, particularly in light of the Court's recent decisions approving the arbitration of various other statutorily-based claims.

In addition, because the instant case involves an individual arbitration agreement and *not* a collective bargaining agreement, the Court's concern in *Alexander*, 415 U.S. at 58 n.19, that "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit" simply does not exist herein. Thus, in the instant case, unlike in *Alexander*, Alford would have absolute control over the arbitration of her statutory claims pursuant to her individual arbitration agreement. The decisions of this Court in *Buell*, *McDonald*, and *Barrentine*, therefore, are no more instructive on the issues presented herein than is *Alexander* because they also involved statutory claims that arose in the context of a collective bargaining agreement where the individual was not in command of his own claim.

Likewise, the concern in *Alexander*, 415 U.S. at 53, that an arbitrator might lack the power to invoke legislation

that is in conflict with the collective bargaining agreement also should not exist herein. As the Court noted in *McMahon*, 482 U.S. at 231 "there is no reason to assume at the outset that arbitrators will not follow the law," and judicial review of an arbitrator's decision is "sufficient to ensure that arbitrators comply with the requirements of the statute." *Id.*[16]

Nor can a persuasive argument be made that issues arising under Title VII would be too factually or legally complex for an arbitrator. As the Court noted in *McMahon*, 482 U.S. at 231 (quoting *Mitsubishi*, 473 U.S. at 633-34), "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust [and securities] claims, notwithstanding the absence of judicial instruction and supervision." *See also Gilmer*, 895 F.2d at 201; *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 234 (3d Cir. 1989) (Becker, J., dissenting). Claims under Title VII clearly are no more complex than antitrust, securities, or RICO claims, all of which have been held by this Court to be arbitrable.[17]

Finally, concerns expressed by this Court in *Alexander*, 415 U.S. at 56-58, about the adequacy of the arbitral

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[16] As noted above, by agreeing to arbitrate statutory claims of discrimination pursuant to an individual arbitration agreement, a party does not agree to forego the substantive rights afforded by the statute, but rather merely agrees to their resolution in an arbitral forum. *See, e.g., Rodriguez de Quijas*, 109 S. Ct. at 1920; *McMahon*, 482 U.S. at 229; *Mitsubishi Motors Corp.*, 473 U.S. at 628.

[17] Moreover, it is clear that in enacting Title VII, Congress did not intend that the federal courts would be the exclusive forum for vindicating rights under Title VII. *See Yellow Freight System, Inc. v. Donnelly*, 110 S. Ct. 1566, 1567, 1570 (1990) (state courts have concurrent authority to adjudicate Title VII claims). If anything, this grant of concurrent jurisdiction over Title VII claims supports the notion that parties may agree to have their claims determined in an arbitral forum. *See Rodriguez de Quijas*, 109 S. Ct. at 1920; *Gilmer*, 895 F.2d at 200 ("Congress' grant of concurrent jurisdiction over ADEA suits may evince an affirmative intent apart from that contained in the FAA, to permit waiver of the judicial forum.").

process clearly are out of step with the Court's recent endorsements of arbitration as an effective and efficient means to resolve disputes. For example, in *Mitsubishi*, 473 U.S. at 626-27, the Court stated that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." In *McMahon*, 482 U.S. at 231, the Court also observed that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights."

Moreover, this Court in *Rodriguez de Quijas*, 109 S. Ct. at 1920 (overturning its earlier decision in *Wilko v. Swan*, 346 U.S. 427 (1953), which had held that claims under the Securities Act of 1933 were not subject to arbitration), recognized the unpersuasiveness of concerns such as those expressed in *Alexander* regarding the adequacy of the arbitral process:

> To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.[18]

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[18] *Wilko* was cited with apparent approval by the Court in *Alexander*, 415 U.S. at 57-58, in support of its concerns regarding the then-perceived inadequacies in the arbitral process. Even prior to its decision in *Rodriguez de Quijas*, however, this Court in *McMahon*, 482 U.S. at 231-32 (citations omitted), also had been highly critical of the concerns expressed in *Wilko* regarding the adequacy of the arbitral process:

> [T]he reasons given in *Wilko* reflect a general suspicion of the desirability of arbitration and the competence of arbitral tribunals—most apply with no greater force to the arbitration of securities disputes than to the arbitration of legal disputes generally. It is difficult to reconcile *Wilko's* mistrust of the

Thus, review of the Fifth Circuit decision in this case is necessary to enable the Court to resolve the conflict with *Gilmer* and to determine the applicability, if any, of *Alexander* where the FAA otherwise would require arbitration of Title VII claims pursuant to an *individual* arbitration agreement. In addition, because the issues presented herein involve critical questions regarding the relationship between the FAA and Title VII that are arising with increasing frequency in the lower courts, it is appropriate for the Court to resolve the various important issues presented in this case.

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arbitration process with this Court's subsequent decisions involving the Arbitration Act.

Indeed, most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable. In *Mitsubishi*, for example, we recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision. Likewise, we have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights. Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 89-2599

JOAN CHASON ALFORD,
Plaintiff-Appellee,

v.

DEAN WITTER REYNOLDS, INC. and DON L. HARRIS,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

July 11, 1990

Before CLARK, Chief Judge, THORNBERRY, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Joan Alford was a stockbroker with Dean Witter Reynolds, Inc. ("Dean Witter") until she was fired for allegedly discriminatory reasons. The issue before us is whether she may pursue a Title VII lawsuit for sex discrimination and sexual harassment or must, as the company contends, submit to commercial arbitration of her claim. In 1974, a unanimous Supreme Court held that Title VII claims need not be relegated to the arbitration process governed by a collective bargaining agreement. *Alexander v. Gardner—Denver Company*, 415 U.S. 36,

94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). We conclude that, despite the Court's subsequent series of decisions encouraging commercial arbitration, *Alexander* governs this case. We therefore affirm the district court's denial of a dismissal or an order compelling arbitration. 712 F.Supp. 547.

This dispute requires us to reconcile the strong national policy favoring commercial arbitration, 9 U.S.C. § 2, with the equally important federal legislation designed to combat discrimination.[1] Dean Witter forcefully argues that in recent Supreme Court jurisprudence, contractual provisions for arbitration have prevailed against pleas for litigation of various statutorily-founded claims, including those under the securities, RICO and anti-trust laws.[2] The Court has declared that

> As a matter of federal law [the Federal Arbitration Act], any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . .

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927 at 941-42, 74 L.Ed.2d 765 (1985). The Court has also held that, "we rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 1243, 84 L.Ed.2d 158 (1985). That the claim rests on federal statutory grounds does not necessarily render it less susceptible to arbitration:

> The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statu-

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[1] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

[2] *Rodriguez De Quijas v. Shearson/American Express, Inc.*, —— U.S. ——, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) (Securities claims); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) (RICO and Securities Exchange Act § 10(b)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), (antitrust).

> tory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rites [*sic*] at issue. . . . If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent "will be deductible from [the statute's] text or legislative history," . . . or from an inherent conflict between arbitration and the statute's underlying purposes." . . . (citations omitted).

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226-27, 107 S.Ct. 2332, 2337, 96 L.Ed.2d 185 (1987). Permitting enforcement of statutory remedies by means of contractual arbitration has thus become the norm rather than the exception for contracts governed by the Federal Arbitration Act ("FAA").

If the issue were open to us to evaluate afresh, we might well interpret Title VII consistent with these recent decisions. But, because of the *Alexander* decision, the issue is not an open one. In *Alexander*, the Supreme Court held that a union employee was not foreclosed by his lack of success in an arbitration compelled by his collective bargaining agreement from later pursuing a Title VII suit for his employer's racial discrimination. After analyzing the enforcement scheme of Title VII and finding that "federal courts have been assigned plenary powers to secure compliance with Title VII," 415 U.S. at 45, 94 S.Ct. at 1018, the Court held that,

> [t]here is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction.

415 U.S. at 47, 94 S.Ct. at 1019. The Court rejected a rule of blanket deference owed by federal courts to the prior findings of arbitrators on Title VII issues:

> The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal. Furthermore, we have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.' *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 359-360, 91 S.Ct. 409, 413-14 [27 L.Ed.2d 456] (1971) (Harlan, J., concurring).

Alexander, 415 U.S. at 56, 94 S.Ct. at 1023. In a final footnote citing factors relevant to a federal court's decision to admit in evidence a prior arbitral award, the Court added:

> . . . courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.

Alexander, 415 U.S. at 60, n. 21, 94 S.Ct. at 1025, n. 21.

Although distinctions between *Alexander* and the present case will be considered, we regard *Alexander*'s rationale as broad enough to speak to any arbitration of Title VII claims. Two other circuits have already so held. *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir.1989); *Swenson v. Management Recruiters International, Inc.*, 858 F.2d 1304, 1307 (8th Cir.1988), *reh'g denied*, 872 F.2d 264 (8th Cir.1989). No circuit court has held otherwise.[3]

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[3] *But see Roe v. Kidder Peabody & Co., Inc.*, No. 88 Civ. 8507, slip op. 1990 WL52200 (S.D.N.Y. Apr. 18, 1990) (Title VII claim may be arbitrated under FAA). Circuit and district courts have divided over the arbitrability of employee claims under the Age Discrimination in Employment Act, which is very similar to Title VII. *See Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir.1989)

Dean Witter nevertheless urges that *Alexander* does not control this case for three reasons. First, *Alexander* specifically held that an employee may pursue both arbitration and Title VII remedies simultaneously, thus implying that Alford may be required to arbitrate first and sue later. Second, *Alexander* was premised upon the nature of labor arbitration, which is distinguishable in this context from arbitration under the FAA. Third, the rationale of *Alexander* has been undercut by the Supreme Court decisions affirming the use of commercial arbitration in statutorily-founded claims. None of these arguments is convincing enough.

It is true that *Alexander* emphasized the availability of two overlapping remedies for discrimination in that case—the non-discrimination clause in the plaintiff's union contract and his Title VII claim. To conclude, as the Court did, that the plaintiff could pursue each claim in the appropriate forum does not equate to concluding that a plaintiff must always "exhaust" contractual arbitration remedies before filing a Title VII suit.[4] When a plaintiff asserts only claims founded on employment discrimination proscribed by Title VII, and she challenges no other feature of her employment relationship except as it was affected by the alleged discrimination, she well may find no reason to pursue arbitration. However, the contract does provide for arbitration of any

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(*contra* arbitration); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir.1988); *Johnson v. Univ. of Wisconsin-Milwaukee*, 783 F.2d 59, 62 (7th Cir.1989); *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir.1990), *reh'g en banc denied*, (March 28, 1990) (*pro* arbitration); *Pihl v. Thompson McKinnon Securities, Inc.*, 48 FEP cases 922, 924, 1988 WL54036 (E.D.Pa.1988) (*pro* arbitration); *Pierce v. Shearson Lehman Hutton, Inc.*, No. 90-C-0722, slip op., 1990 WL60751 (N.D.Ill. Apr. 25, 1990) (*pro* arbitration).

[4] *Compare Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965) (requiring exhaustion of collective bargaining remedies by union employees).

controversy arising out of the employment relationship and *Alexander* provides that if arbitration is pursued any award may be introduced in the court action "and accorded such weight as the court deems appropriate." *Alexander*, 415 U.S. 60, 94 S.Ct. at 1025.

Dean Witter's second argument against the applicability of *Alexander* is that it turned on the collective bargaining context in which the plaintiff's claim arose. The Court denied that Alexander, by being a union member, had waived his Title VII rights or was foreclosed by the doctrine of election of remedies from pursuing his statutory claim. 415 U.S. at 50-52, 94 S.Ct. at 1020-21. The Court was concerned that a labor arbitrator, whose duty is to enforce the parties' contract rather than extrinsic law, would be unsuited to apply Title VII principles. 415 U.S. at 54, 57-59, 94 S.Ct. at 1022, 1024-25. The Court also commented that in pursuing an employee grievance, a Union has to satisfy its institutional interest as well as that of the employee. This relationship may deprive the employee of full authority over the fate of his Title VII claim, in derogation of his statutory right. 415 U.S. at 59, n. 19, 94 S.Ct. at 1024, n. 19.

While these points are fairly made, they do not carry the day, because they refer to case-specific considerations that reinforced the Court's ultimate conclusion "that the federal policy favoring arbitration does not establish that an arbitrator's resolution of a contractual claim is dispositive of a statutory claim under Title VII." 415 U.S. at 47, n. 6, 94 S.Ct. at 1019, n. 6. The Court's emphasis on arbitration pursuant to collective bargaining agreements may be seen as a response to the only kind of arbitration then prevalent in employment relations. *Alexander* predates the Court's decisions giving full rein to the FAA, and no FAA question is likely to have been considered in *Alexander*. This does not mean, however, that *Alexander* should not apply until the Court holds otherwise. As we have already stated, *Alexander* appears to rest first on a construction of Title VII. Al-

though there are significant differences between labor arbitration and commercial arbitration—relating to the arbitrator's competence in public law issues and the autonomy with which an employee may pursue an arbitration remedy—there is also a strong federal policy favoring labor arbitration.[5] The Court's decision to subordinate that policy to Title VII gives us pause, to say the least, before inferring that commercial arbitration would not likewise be subordinated.

Dean Witter finally asserts that *Alexander* has been overshadowed by the Court's later decisions favoring commercial arbitration. As the company recognizes, our court was specifically reminded that we have no authority to overrule an apparently controlling Supreme Court decision because it "appears to rest on reasons rejected in some other line of decisions . . ." *Rodriquez De Quijas v. Shearson/American Express, Inc.*, —— U.S. ——, 109 S.Ct. at 1921. We are bound by the broad wording of *Alexander*.

AFFIRMED.

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[5] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-88-2295

JOAN CHASON ALFORD,
Plaintiff,

v.

DEAN WITTER REYNOLDS, INC., and
DON L. HARRIS,
Defendants.

[Entered May 31, 1989]

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION

This is a sex discrimination suit filed by Plaintiff, Joan C. Alford (Alford) pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982) (Title VII) against Defendants Dean Witter Reynolds, Inc., and Donald L. Harris. The Defendants have moved this Court to dismiss with prejudice Plaintiff's suit and to compel arbitration of Plaintiff's claims. For the reasons set forth below, the Court denies Defendants' Motion to Dismiss and Compel Arbitration.

As a condition of her employment with Dean Witter, Alford executed an application and agreement for regis-

tration with the New York Stock Exchange, Inc. (NYSE), and the National Association of Security Dealers, Inc., which contained a clause stating she agreed to resolve by arbitration any controversy arising out of her employment including her termination. Additionally, Rule 347 of the NYSE also called for arbitration of employment-related disputes upon demand by either party. The Defendants seek to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982), and assert that the United States Supreme Court's opinions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1986), and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. ——, 107 S. Ct. 2332 (1987), require Alford to submit her federally protected rights to arbitration. The Court finds that the Supreme Court's decisions in Title VII cases do not require Alford to arbitrate her Title VII claims.

This case is controlled by the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). In *Alexander*, the court held that clearly "there can be no prospective waiver of an employee's rights under Title VII." *Id.* at 51. The court found that Congress intended the federal courts to exercise final responsibility for the enforcement of Title VII and that deferral to arbitration would be inconsistent with that goal. *Id.* at 56. Neither *Shearson* nor *Mitsubishi* overrules *Alexander*.

In *Mitsubishi*, the Supreme Court recognized that not all controversies implicating statutory rights should be submitted to arbitration. *Mitsubishi*, 473 U.S. at 627. There are some statutory rights which Congress intended to preclude a waiver of the right to resort to a judicial forum for resolution of the statutory right at issue. *See id.* at 627-28. Congress's intention to prohibit such a waiver would be deducible from the text or legislative history of the statute, *Mitsubishi*, 473 U.S. at 628, or

from the inherent conflict between arbitration and the statute's underlying purposes, *Shearson*, 482 U.S. at ——; 107 S. Ct. at 2337. The court in *Alexander* examined the intention of Congress in passing Title VII and found not only that Congress intended the federal courts to exercise final responsibility for the enforcement of Title VII, *Alexander*, 415 U.S. at 56, but also that there was inherent conflict between arbitration and the congressional purpose of Title VII, *id.* at 56-59.

The Defendants argue that *Alexander* has been overruled by implication by the Supreme Court's later opinions in *Shearson* and *Mitsubishi*.[1] This issue was squarely addressed by the Eighth Circuit Court of Appeals in *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988). In *Swenson*, the plaintiff had signed an employment agreement which provided, in part, for the arbitration of any controversies between her and her employer pursuant to the commercial arbitration rules of American Arbitration Association. The Eighth Circuit Court of Appeals noted that the Supreme Court's decision in *Alexander* did not turn upon the issue of whether the agreement of arbitration was pursuant to a collective bargaining agreement but instead turned on "the unique nature of Title VII." *Swenson*, 858 F.2d at 1306. Relying upon the Supreme Court's opinion in *Alexander*, the court then held that a commercial agreement to arbitrate under the Federal Arbitration Act could not preempt the plaintiff's right to seek a judicial determination of her Title VII claims. *Swenson*, 858 F.2d at 1307, 1309. Thus, the Court concludes that Alford's Title VII claims are not subject to arbitration. Accordingly, the Court

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[1] The Defendants suggest that in light of these more recent opinions, the Supreme Court would now overrule *Alexander*. The court's decision in *Alexander*, however, is binding upon this Court and the district courts have no power to overrule it. *Marcello v. Ahrens*, 212 F.2d 830, 838-39 (5th Cir. 1954).

ORDERS that all relief sought in Defendants' Motion to Dismiss and Compel Arbitration be, and is hereby, DENIED.

SIGNED at Houston, Texas, on this 29th day of May, 1989.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2599

JOAN CHASON ALFORD,
Plaintiff-Appellee,
versus

DEAN WITTER REYNOLDS, INC. and DON L. HARRIS,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(August 3, 1990)

Before CLARK, Chief Judge, THORNBERRY, and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge
8/3/90

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2599

D.C. Docket No. CA H 88 2295

JOAN CHASON ALFORD,
Plaintiff-Appellee,

versus

DEAN WITTER REYNOLDS, INC., and DON L. HARRIS,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

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[Filed July 11, 1990]

Before CLARK, Chief Judge, THORNBERRY and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: Aug. 13, 1990

July 11, 1990

APPENDIX E

FEDERAL ARBITRATION ACT, 9 U.S.C. §§ 1 *et seq.*

Section 2, 9 U.S.C. § 2:

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, c. 392, 61 Stat. 670.)

Section 3, 9 U.S.C. § 3:

Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, c. 392, 61 Stat. 670.)

Section 4, 9 U.S.C. § 4:

Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall

make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.)

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. §§ 2000e *et seq.*

Section 706, 42 U.S.C. § 2000e-5:

Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure

of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeav-

ors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written

and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment prac-

tice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Com-

mission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the At-

torney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not

found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate,

which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(h) Provisions of sections 101 to 115 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

(Pub. L. 88-352, title VII, § 706, July 2, 1964, 78 Stat. 259; Pub. L. 92-261, § 4, Mar. 24, 1972, 86 Stat. 104.)